No. 18-16663

In the United States Court of Appeals for the Ninth Circuit

CITY OF OAKLAND, CITY AND COUNTY OF SAN FRANCISCO, AND THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFFS-APPELLANTS

v.

BP P.L.C., CHEVRON CORPORATION, CONOCOPHILLIPS, EXXON MOBIL CORPORATION, AND ROYAL DUTCH SHELL PLC, DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (CIV. NOS. 17-6011 & 17-6012) (THE HONORABLE WILLIAM H. ALSUP, J.)

BRIEF OF APPELLEES BP P.L.C., CONOCOPHILLIPS, EXXON MOBIL CORPORATION, AND ROYAL DUTCH SHELL PLC

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CORPORATE DISCLOSURE STATEMENT

Appellee BP p.l.c. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Appellee ConocoPhillips has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Appellee Exxon Mobil Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Appellee Royal Dutch Shell plc has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Appellees BP p.l.c., ConocoPhillips, Exxon Mobil Corporation (ExxonMobil), and Royal Dutch Shell plc file this brief urging affirmance of the district court's judgment on the ground that the court lacked personal jurisdiction over appellees. Under Federal Rule of Appellate Procedure 28(i), appellees join fully in the brief filed by Chevron Corporation addressing subject-matter jurisdiction and the merits.

STATEMENT OF JURISDICTION

This Court has jurisdiction for the reasons set forth in appellants' brief. *See* Br. 2.

STATEMENT OF THE ISSUE

Whether the district court correctly ruled that it lacked specific personal jurisdiction over the nonresident defendants for alleged harms to the cities of Oakland and San Francisco resulting from global climate change.

STATEMENT OF THE CASE

This case involves a straightforward application of this Court's and the Supreme Court's precedents on the exercise of specific personal jurisdiction. The city attorneys of Oakland and San Francisco filed suit in California against four nonresident oil-and-gas companies (as well as one resident company), alleging that defendants' worldwide production of fossil fuels contributed to global climate change, which in turn led to a rise in sea levels, which in turn

harmed (and will harm) the cities' public infrastructure. Plaintiffs' own allegations describe climate change as a global phenomenon, resulting in part from the worldwide use of fossil fuels over many decades. The cities, however, have not alleged that the nonresident defendants' forum-related conduct was a but-for cause of the alleged injuries. The district court's decision to dismiss the complaints for lack of personal jurisdiction was therefore correct.

The cities do not contest that they must establish but-for causation in order to obtain specific jurisdiction over defendants in California. Instead, they argue that the district court incorrectly applied the but-for test. But the cities cannot cast defendants' worldwide production of fossil fuels over the last century as "California-related" simply because that global conduct allegedly led to emissions that, in combination with other emissions, eventually contributed to harm in California. The cities' various efforts to relax the causal test also fail, both because the cities never made those arguments below and because the arguments lack merit.

The district court faithfully and correctly applied this Court's framework for analyzing specific jurisdiction. Its judgment should be affirmed.

A. Background

BP p.l.c., Chevron Corporation, ConocoPhillips, ExxonMobil, and Royal Dutch Shell plc are five of the world's largest publicly traded oil-and-gas companies. Aside from Chevron, all of the companies are located outside the State

of California. BP is a British company headquartered in the United Kingdom. E.R. 63, 135. ConocoPhillips is a Delaware corporation headquartered in Texas. E.R. 65, 136. ExxonMobil is a New Jersey corporation headquartered in Texas. E.R. 66, 137. And Royal Dutch Shell is a British company headquartered in the Netherlands. E.R. 66, 138.

In September 2017, the city attorneys for the City of Oakland, California, and the City of San Francisco, California, acting on behalf of the People of the State of California, each filed a public-nuisance action against defendants in California state court to recover for climate-change-related harms. E.R. 275, 414. The complaints alleged that defendants "have been producing fossil fuels continuously for over a hundred years" and are "collectively responsible" for "over 11% of all the carbon and methane pollution from industrial sources that has accumulated in the atmosphere since the dawn of the Industrial Revolution." E.R. 89-90, 159-160. Those emissions, the complaints further alleged, have contributed to climate change and an accompanying rise in sea levels. E.R. 89, 159. The complaints demanded that the defendants set up an "abatement fund" to offset the infrastructure costs necessary for the cities to adapt to the rising sea levels and other "global warming impacts." E.R. 118-119, 184.

B. Proceedings In Federal Court

The defendants removed the cases to the Northern District of California on multiple grounds, including that the cities' claims (however styled) arose under federal common law, giving rise to federal-question jurisdiction. E.R. 203, 239. The district court agreed and denied the cities' motion to remand. E.R. 27. The defendants then filed motions to dismiss on various grounds.

1. BP, ConocoPhillips Company, ExxonMobil, and Royal Dutch Shell moved to dismiss the case for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2); E.R. 3. The jurisdictional problem, defendants argued, was that the cities' claims did not arise out of defendants' activities in California, but rather from the alleged worldwide combustion of fossil fuels dating from the nineteenth century. Defendants also argued, as relevant here, that the exercise of jurisdiction in these circumstances would be unreasonable. The cities responded by amending their complaints, mooting the pending motions. Supp. E.R. 3.

The cities' amended complaints added an express public-nuisance claim under federal common law, included the cities as co-plaintiffs suing on their own behalf, substituted ConocoPhillips for its operating subsidiary ConocoPhillips Company, and incorporated new jurisdictional allegations focused on defendants' subsidiaries that do or did business in California. Supp. E.R. 9-11. The new jurisdictional allegations stated that defendants' subsidiaries produced and refined oil in California; owned or managed ports for receiving

shipments of oil in California; operated pipelines, storage tanks, and distribution facilities in California; shipped oil products to California; and operated gas stations in California. E.R. 67-83, 138-154. The complaints proceeded on the assumption that those activities could be attributed to the defendant parent corporations. The complaints did not allege, however, that those in-state activities caused climate change or a rise in sea levels.

2. BP, ConocoPhillips, ExxonMobil, and Royal Dutch Shell (hereafter referred to as "defendants") filed revised motions to dismiss the amended complaints, including motions to dismiss for lack of personal jurisdiction. *See* E.R. 5-6. As relevant here, defendants again focused their personal-jurisdiction arguments on the lack of but-for causation.[1] After holding oral argument, the district court entered an order dismissing the complaints for failure to state a claim but not addressing personal jurisdiction. *See* E.R. 11.[2] The court then asked the parties to file a joint submission addressing whether it should address personal jurisdiction before entering judgment. Supp. E.R. 18. Defendants asked the court to do so. Supp. E.R. 21.

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[1] Defendants assumed *arguendo* that the California activities of their subsidiaries and affiliates qualified as the parent corporation's "purposeful contacts" for jurisdictional purposes. *See* E.R. 7.

[2] As there was no dispute that the district court had personal jurisdiction to hear the claims as against Chevron, a resident defendant, it necessarily had to reach the merits of the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

3. A few weeks later, the district court entered an additional order dismissing on the ground that it lacked personal jurisdiction over the nonresident defendants. E.R. 3. Recognizing that "[o]nly specific jurisdiction [was] at issue," the court began from the premise that it could exercise specific jurisdiction over a nonresident defendant only if "the claim . . . 'arises out of or relates to' the defendant's forum-related activities." E.R. 6, 7 (citation omitted). Under this Court's precedents, the district court noted, that requirement demands pleading and proof of a but-for relationship between the defendant's forum contacts and the plaintiff's injury. E.R. 7 (citing *Doe* v. *American National Red Cross*, 112 F.3d 1048, 1051-1052 (9th Cir. 1997)). The question for the court was thus whether "the effects of global warming-induced sea level rise . . . would have occurred even absent each defendant's respective *California-related* activities." *Id.*

The district court determined that the cities had failed to make the necessary showing. "The gravamen of the complaints," the court explained, "is that defendants . . . have contributed to global warming through the worldwide production and sale of fossil fuels." E.R. 8. But "[f]rom all that appears in the amended complaints," the court observed, "this worldwide chain of events does not depend on a particular defendant's contacts with California." *Id.* The court added that "[o]cean rise, as far as plaintiffs contend, would have occurred even without regard to each defendant's California contacts." *Id.*

The district court then addressed and rejected each of the cities' counterarguments. The cities had first argued that "defendants' mere contributions to climate change through their California contacts can subject them to personal jurisdiction in California." E.R. 8. But the court recognized that "that is not the causal test for personal jurisdiction applied in this circuit." *Id.* The court also disagreed that a State could subject a defendant to personal jurisdiction when the alleged "injuries have been caused by 'the totality of [the defendants'] national conduct'" and "some of the relevant conduct" occurred "within the forum." *Id.* In each of the cases the cities cited for that proposition, the court explained, "the defendant's forum conduct was clearly the but-for cause of the plaintiff's forum injury." E.R. 9.

The district court also refused to apply "a less stringent standard of 'but for' causation in light of the liability rules underlying public nuisance claims." E.R. 9. This Court, the district court pointed out, had long instructed that "liability is not to be conflated with amenability to suit in a particular forum." *Id.* (quoting *AT&T Co.* v. *Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996)).

Finally, the district court ruled that Federal Rule of Civil Procedure 4(k)(2) did not permit jurisdiction over BP and Royal Dutch Shell. E.R. 10. The court concluded that, "[e]ven taking plaintiffs' allegations as true," the

cities had "failed to show that BP or Royal Dutch Shell's national conduct was a 'but for' cause of their harm." *Id.*

SUMMARY OF ARGUMENT

A. A court can exercise specific jurisdiction over a nonresident defendant only where the plaintiff's claim "arises out of or relates to" the defendant's contacts with the forum state. This Court has long held that, in order to satisfy the "arising out of" requirement, the plaintiff must show that its claims would not have arisen but for the defendant's forum-related contacts. The cities have failed to make that showing, and the district court thus correctly dismissed the complaints.

1. The cities claim that defendants' worldwide production of fossil fuels led to emissions that contributed to global climate change and a corresponding rise in sea levels. But the cities do not—and indeed cannot—say that climate change and any corresponding rise in sea levels would not have occurred but for defendants' California-related conduct. Climate change is a global phenomenon, allegedly resulting in part from the worldwide use of fossil fuels. But-for causation between defendants' California-related conduct and the cities' alleged injuries is therefore not present.

2. The cities offer various arguments in response to that basic syllogism. Those arguments lack merit.

a. The cities first raise a doctrinal argument based on the interplay between the prongs of this Court's test for specific jurisdiction. While the upshot of that argument is not entirely clear, the cities appear to be arguing that specific jurisdiction arises whenever a defendant purposefully directs tortious activity at the forum State and injury occurs in the forum State—even if but-for causation is not present. But such an argument doubly fails: the cities affirmatively waived it below, and this Court's precedents squarely foreclose it.

b. The cities next argue that the district court erred by refusing to consider any actions that defendants took outside California as part of the jurisdictional analysis. But the district court did nothing of the sort, and it is clear that the cities are in fact making a far more sweeping assertion: that all of defendants' *worldwide* production should qualify as California-related simply because defendants allegedly knew that climate change and a rise in sea levels would eventually occur. But even allegations of foreseeable harm in California are not enough to warrant the exercise of specific jurisdiction. And even if defendants *knew* that harm would eventually result in California in particular, that alone would not suffice absent some more meaningful connection between defendants' worldwide fossil-fuel production and the State of California. Indeed, the upshot of the cities' theory of jurisdiction is that companies in

countless industries would be subject to climate-change litigation in every jurisdiction affected by climate change. The Supreme Court has warned against exorbitant exercises of specific jurisdiction of exactly that sort.

c. The cities also argue that the district court erred in two ways in applying the but-for test. First, the cities assert that the district court refused to find but-for causation unless a materially greater proportion of climate-change-related harm occurred in California than other jurisdictions. But the district court did not apply such a rule. Second, the cities argue that but-for causation is present as long as defendants *contributed* to climate change and a rise in sea levels. But that is not how but-for causation works. If the cities' alleged injuries would have arisen even absent defendants' relevant conduct, but-for causation is lacking. In any event, the cities failed to allege that defendants' California-related conduct was a but-for cause of *any* sea-level rise. Nor would application of the "substantial factor" test in lieu of the but-for test alter the result. The substantial-factor test subsumes the but-for test and adds liability only in a narrow set of circumstances not present here.

B. Even if this Court were to disagree with the district court's analysis of the "arising out of" element of the jurisdictional analysis, the Court should still affirm on the ground that the exercise of specific jurisdiction here would be unreasonable. The cities' theory of specific jurisdiction would allow plaintiffs to haul companies and individuals, foreign and domestic, involved in

countless industries into court in nearly every jurisdiction in the United States for climate-change-related claims. That impinges on the sovereignty of other States and foreign nations alike. If other nations adopted a similar rule, American companies could be subject to suit for climate-change-related claims across the globe. This Court should not countenance such an exorbitant approach to specific jurisdiction.

C. Finally, the cities argue that the district court had specific jurisdiction over BP and Royal Dutch Shell under Federal Rule of Civil Procedure 4(k)(2). But the cities have not shown that their alleged injuries would not have arisen but for BP's and Royal Dutch Shell's contacts with the United States as a whole. The district court correctly rejected that argument as well, and its judgment should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINTS FOR LACK OF SPECIFIC PERSONAL JURISDICTION

Under the Due Process Clause, a court can exercise personal jurisdiction over a nonresident defendant only if that defendant has sufficient "minimum contacts" with the forum such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014); *see Axiom Foods, Inc.* v. *Acerchem International, Inc.*, 874 F.3d 1064, 1067 (9th Cir. 2017) (holding that personal juris-

diction in California extends to due-process limits). Two forms of personal jurisdiction exist: general and specific. *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1779-1780 (2017). The cities have not argued that the nonresident defendants are subject to general jurisdiction in California. *See* E.R. 6.

Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation." *Walden*, 134 S. Ct. at 1121 (internal quotation marks and citation omitted). A court can exercise specific jurisdiction only when "the defendant's suit-related conduct . . . create[s] a substantial connection with the forum State." *Id.* This Court applies a three-pronged test for assessing whether the necessary relationship is present: (1) "the defendant must either purposefully direct his activities toward the forum or purposefully avail himself of the privileges of conducting activities in the forum"; (2) "the claim must be one which arises out of or relates to the defendant's forum-related activities"; and (3) "the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable." *Axiom Foods*, 874 F.3d at 1068; *see Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472-476 (1985).

Applying that test here, the district court correctly held that it lacked personal jurisdiction over defendants. The cities have not established that their climate-change-related claims arise out of or relate to defendants' forum-

related activities. Nor would the exercise of specific jurisdiction over defendants be reasonable. The district court therefore correctly dismissed the claims against defendants for lack of personal jurisdiction, and this Court should affirm.

A. The Cities' Claims Do Not Arise Out Of Or Relate To Defendants' California-Related Activities

This Court has long interpreted the second, "arising out of" prong of its specific-jurisdiction framework as requiring a but-for relationship between the defendant's forum activities and the plaintiff's claims. *See, e.g.*, *Doe* v. *American National Red Cross*, 112 F.3d 1048, 1051-1052 & n.7 (9th Cir. 1997); *In re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 742 & n.23 (9th Cir. 2013), *aff'd on other grounds*, 135 S. Ct. 1591 (2015). Under the but-for approach, specific jurisdiction exists only when the plaintiff can show that "he would not have suffered an injury 'but for' [the defendant's] forum-related conduct." *Menken* v. *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007). If the plaintiff "would have suffered the same injury even if none of the [forum] contacts had taken place," the claim is "not one [that] arose out of or resulted from [the defendant's] forum-related activities." *Omeluk* v. *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 272 (9th Cir. 1995). The cities' claims do not satisfy that test.

1. Defendants' California-Related Conduct Was Not A But-For Cause Of The Cities' Alleged Injuries

In their amended complaints, the cities made no effort to tie defendants' California conduct to the specific injuries they alleged. As the district court correctly recognized, "[t]he gravamen" of the cities' public-nuisance claims "is that defendants . . . have contributed to global warming" and an accompanying rise in sea levels "through the worldwide production and sale of fossil fuels." E.R. 8. But "[f]rom all that appears in the amended complaints, this worldwide chain of events does not depend on a particular defendant's contacts with California." *Id.* Indeed, "as far as plaintiffs contend," "[o]cean rise . . . would have occurred even without regard to each defendant's California contacts." *Id.* And that means the cities "would have suffered the same injury even if none of [defendants' California] contacts had taken place." *Omeluk*, 52 F.3d at 272. The cities have thus failed to show a but-for relationship between their injuries and defendants' California-related conduct, precluding the exercise of personal jurisdiction. *See Menken*, 503 F.3d at 1058.

Not only did the cities fail to make the necessary showing; they cannot do so. It is simply implausible that the cities would have avoided the alleged climate-change-related harms if defendants had never engaged in their forum-related conduct. In the district court's words, the cities' nuisance claims "depend on a global complex of geophysical cause and effect involving all nations of the planet." E.R. 8. "[T]his worldwide chain of events does not depend on

a particular defendant's contact with California." *Id.* "[W]hatever sales or events occurred in California were causally insignificant in the context of the worldwide conduct leading to the international problem of global warming." *Id.*; *cf. Sierra Club* v. *United States Defense Energy Support Center*, Civ. No. 11-41, 2011 WL 3321296, at *4 (E.D. Va. July 29, 2011) (dismissing plaintiffs' climate-change-related claims for failure to plead causation based on similar reasoning). The district court therefore properly dismissed the claims against defendants for lack of personal jurisdiction. *See Menken*, 503 F.3d at 1058.

The article on which the cities relied to estimate each defendant's attributed share of worldwide "industrial" emissions since the Industrial Revolution does not prove otherwise. E.R. 90. Even if the article's findings were accurate (which defendants dispute), the article neither connects those alleged emissions to the cities' asserted injuries nor shows that the cities' same injuries would not have occurred had defendants' subsidiaries reduced or ended their activities in California. In addition, the article is irrelevant to the jurisdictional analysis, because it estimates defendants' emissions based on defendants' worldwide production since the Industrial Revolution, rather than defendants' California-related production during the far shorter period the cities allege is relevant to their claims. *See id.*

2. The Cities' Arguments To The Contrary Lack Merit

The cities challenge the district court's jurisdictional analysis on a variety of grounds. Many of the cities' arguments were never raised below, rendering them unavailable on appeal. None of the remaining arguments withstands scrutiny.

a. The Cities' Doctrinal Argument Is Either Incorrect Or Irrelevant

The cities' principal argument on appeal involves the interplay between the first two prongs of this Court's specific-jurisdiction analysis: (1) whether the defendant "purposefully direct[ed] his activities toward the forum or purposefully avail[ed] himself of the privileges of conducting activities in the forum," and (2) whether the plaintiff's claim "arises out of or relates to the defendant's forum-related activities." *Axiom Foods*, 874 F.3d at 1068. The cities argue that, "[o]nce a court finds that a defendant intentionally 'aimed at' a targeted plaintiff" under the first prong, "it logically follows that plaintiff's resulting lawsuit 'arises out of or relates to' that intentional conduct" under the second prong. Br. 51. The upshot of the cities' position is not entirely clear, but they seem to be suggesting that the mere aiming of intentional tortious conduct at a forum automatically proves the necessary causal connection to exercise specific jurisdiction. *Cf.* Br. 52.

If that is the cities' position, their argument has been waived and is incorrect to boot. In their briefing below, the cities expressly represented that

they were "*not* tak[ing] the position here that merely directing allegedly intentional tortious activity at a plaintiff in the forum state suffices to establish personal jurisdiction." Supp. E.R. 16 n.34. They cannot argue to the contrary now. *See, e.g.*, *Reynoso* v. *Giurbino*, 462 F.3d 1099, 1110 (9th Cir. 2006); *Garcia-Moreno* v. *Sessions*, 718 Fed. Appx. 531, 533 n.1 (9th Cir. 2018).

Moreover, under this Court's purposeful-direction test, it is not enough for the plaintiff to show that the defendant "expressly aimed" an intentional act at the forum State. The plaintiff must also show that those intentional forum-related acts "*caused harm* that the defendant knew was likely to be suffered in the forum state." *Yahoo! Inc.* v. *La Ligue Contre Le Racisme Et l'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc) (emphasis added). In addition, several of the cases the cities themselves cite analyze the second, "arising out of" prong even when applying the purposeful-direction test at the first prong. *See Western States*, 715 F.3d at 742; *Mavrix Photo, Inc.* v. *Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011); *Doe*, 112 F.3d at 1051-1052; *Omeluk*, 52 F.3d at 271-272; *Haisten* v. *Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1400 (9th Cir. 1986). The cities thus cannot argue that the "arising out of" test does not apply to tort claims involving intentional conduct.

The two copyright-infringement cases the cities cite do not support their effort to collapse the first and second prongs. *See* Br. 51 (citing *Washington*

Shoe Co. v. *A-Z Sporting Goods Inc.*, 704 F.3d 668 (9th Cir. 2012), and *Columbia Pictures Television* v. *Krypton Broadcasting*, 106 F.3d 284 (9th Cir. 1997)). In both cases, the Court concluded that the copyright infringement was "expressly aimed" at the forum, and there was no question that the infringement caused the plaintiff's injuries. *See Washington Shoe*, 704 F.3d at 679; *Columbia Pictures*, 106 F.3d at 289; *see also Axiom Foods*, 874 F.3d at 1070 (concluding that the "express aiming" analysis in *Washington Shoe* is no longer good law in light of the Supreme Court's decision in *Walden*, *supra*).

It is possible the cities are not arguing that the mere aiming of intentional tortious conduct at a forum automatically proves the necessary causal connection to exercise specific jurisdiction. They do not dispute, after all, that specific jurisdiction requires proof that "defendants' tortious, intentional acts were a cause-in-fact"—*i.e.*, a but-for cause—"of plaintiffs' in-state harms." Br. 52. But if the cities' only complaint is that the district court should have analyzed but-for causation under the first prong of the jurisdictional analysis rather than the second, it is unclear why that doctrinal distinction makes a difference. The district court determined that the cities had failed to demonstrate a but-for relationship between defendants' California-related conduct and the claims in this suit. Whether the court made that decision under the first or second prong of the specific-jurisdiction analysis is a purely academic

distinction without a practical difference. The cities also forfeited this argument by failing to raise it below. *See Orr* v. *Plumb*, 884 F.3d 923, 932 (9th Cir. 2018).

The cities draw significant attention to defendants' decision to move to dismiss based on the second prong of the specific-jurisdiction analysis and to assume *arguendo* that the first prong was otherwise satisfied. *See* Br. 48-49, 51. In so doing, the cities may be suggesting that defendants somehow forfeited any argument about but-for causation by not making it under the first prong. *Cf.* Br. of Amicus California State Ass'n of Counties 16-17 (so arguing). That is incorrect. Defendants raised the issue of but-for causation "numerous times in [their] moving papers below," *SEC* v. *Talbot*, 530 F.3d 1085, 1092 n.1 (9th Cir. 2008), and "the district court actually considered it," *Community House, Inc.* v. *City of Boise*, 490 F.3d 1041, 1054 (9th Cir. 2007). Even if the first prong of the jurisdictional analysis also encompasses causation in tort cases, defendants could hardly have conceded the causation issue when they expressly contested it below.

b. The District Court Appropriately Focused On Defendants' California-Related Activities

The cities next argue that the district court "erred in limiting its inquiry to the activities performed by [d]efendants and their agents and subsidiaries

'in California.' " Br. 54. "[A] defendant's out-of-state activities count" for purposes of specific jurisdiction, they say, "if [the activities] are purposefully directed at the state or state residents." *Id.*

The cities are of course correct that out-of-state conduct can be jurisdictionally relevant if directed at the forum State (but not merely at "state residents" outside the forum, *see Walden*, 134 S. Ct. at 1122, 1124-1125). But nothing in the district court's order states that the court refused to consider out-of-state conduct directed at California as part of the jurisdictional analysis. Indeed, it was *the cities* that drew the Court's attention to the activities of defendants' subsidiaries in California by adding allegations about those activities in their amended complaints. *See* E.R. 67-83.

That said, the cities' framing of their argument in terms of mere "out-of-state activities" obscures the sweeping proposition they wish the Court to adopt. Br. 54. The cities are effectively arguing that *all* of defendants' "intentional acts, *domestic* and *foreign*," should factor into the causal analysis because "[d]efendants *knew* [those] acts . . . would inevitably harm California coastal communities" like the cities. *Id.* at 55 (first and second emphases added). The cities are arguing, in other words, that defendants' worldwide production of fossil fuels over the last century qualifies as purposeful contacts because the defendants allegedly learned that those activities would lead to a climate-change-induced rise in sea levels, which in turn would allegedly cause

foreseeable harm to coastal cities everywhere, including California. *See* E.R. 92-97.

Once again, the cities did not raise this argument below, so it is forfeited. *See Orr*, 884 F.3d at 932. In their amended complaints, the cities also failed to make allegations showing that climate change and the accompanying rise in sea levels would not have occurred but for defendants' worldwide conduct—even in the aggregate. The cities' argument therefore fails on its own terms, and the Court need not decide what activities constitute purposeful contacts in this context. *See Menken*, 503 F.3d at 1058.

In any event, the cities' argument lacks merit. As this Court has recognized, "[t]he foreseeability of injury in a forum is not a sufficient benchmark for exercising personal jurisdiction." *Axiom Foods*, 874 F.3d at 1070 (internal quotation marks and citation omitted). To be sure, an out-of-forum action directed into the forum and constituting a but-for cause of an in-forum injury can satisfy the purposeful-direction test. But the test "cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction." *Washington Shoe*, 704 F.3d at 675. "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden*, 134 S. Ct. at 1125.

Here, the link between defendants' worldwide activities and the State of California is too "attenuated," *see Axiom Foods*, 874 F.3d at 1070, to support a finding that defendants "expressly aimed" those activities at the State. At most, the cities allege it might have been foreseeable that a rise in sea level attributable to worldwide combustion of fossil fuels could result in harm in California. *See* E.R. 106-114. Absent allegations that connect defendants' worldwide fossil-fuel production to the State of California in a more "meaningful way," *Walden*, 134 S. Ct. at 1125, there is no basis to treat that global activity as a "jurisdictionally relevant" contact. *Id.; see Axiom Foods*, 874 F.3d at 1070.

Even if defendants had known that their foreign activities would lead to harm in California specifically, that alone would still be insufficient to establish specific jurisdiction. *Schwarzenegger* v. *Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004), illustrates the point. There, a car dealer in Ohio took out local advertisements that used a picture of Arnold Schwarzenegger without his permission. Schwarzenegger sued the Ohio car dealer in California, and this Court concluded that California courts lacked specific jurisdiction. The car dealer had not "expressly aimed" his advertisement at California, the Court reasoned; instead, the advertisement was designed "to entice Ohioans to buy or lease cars." *Id.* at 807. The Court recognized that the car dealer's "intentional act eventually caused harm to Schwarzenegger in California," and that

the dealer even "may have known that Schwarzenegger lived in California." *Id.* But that did not suffice, because the dealer's "express aim was local." *Id.*

So too here. The cities have not alleged that defendants "expressly aimed" their worldwide production of fossil fuels at California. They instead argue that those worldwide activities qualify as "express aiming" because defendants allegedly knew that they would contribute to climate change and a rise in sea levels. But even if defendants knew that the worldwide production and sale of fossil fuels would cause harm specifically in California, more is needed to establish specific jurisdiction than mere knowledge that an out-of-state act will cause harm in the forum State. *See Schwarzenegger*, 374 F.3d at 807.

In arguing to the contrary, the cities are effectively seeking a climate-change exception from the normal rules of specific jurisdiction. Yet the complex and lengthy causal chain necessary to prove the cities' claims undercuts any argument that defendants' expressly aimed their alleged misconduct at California. The cities' claims require proof that (1) defendants extract fossil fuels, (2) which are later refined into finished products and promoted, (3) which are combusted by millions of consumers worldwide, (4) causing the emission of greenhouse gases, (5) which combine with other greenhouse gases from innumerable other sources, (6) which accumulate in the atmosphere over long periods of time, (7) which results in a warmer global climate, (8) which leads to

higher air temperatures, rising sea levels, changing weather, extreme weather events, and other environmental effects, (9) which ultimately causes harm to the cities' interests.

Under the cities' approach, any company whose activities outside a forum state allegedly contributed to climate change would be subject to specific jurisdiction in every jurisdiction affected by climate change. That of course means that every jurisdiction in the United States could exercise jurisdiction over every oil-and-gas company, power company, airline, car manufacturer, and myriad other companies and individuals for any climate-change-related costs. That result has no basis in this Court's case law, and it would not provide defendants with "fair warning" that "a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King*, 471 U.S. at 472 (citation omitted).

The cities claim that *Pakootas* v. *Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018), supports their position. *See* Br. 54-55. Not so. There, a Canadian smelting company dumped toxic waste into a river in Canada that flowed into the United States ten miles downstream. *Pakootas*, 905 F.3d at 572. In upholding the exercise of specific jurisdiction, this Court acknowledged that "express aiming" "mean[s] something more than a foreign act with foreseeable effects in the forum state." *Id.* at 577. But it concluded that the smelting company had directly aimed its waste at Washington because it had

"made use of the river's natural transport system" and knew the waste would flow into the State a short distance downstream. *See id.* at 578.

Pakootas is evidently distinguishable. Defendants' worldwide activities are connected to the cities' injuries in a far less "meaningful way" than a company dumping waste into a river ten miles upstream from the forum State's border. *Walden*, 134 S. Ct. at 1125. The cities here are arguing that defendants' worldwide production of fossil fuels over the last century led to the worldwide combustion of fossil fuels by billions of people across the earth, which in turn led to worldwide climate change, a resulting rise in sea levels, and harm in California. In addition, unlike here, the dumping of toxic waste in *Pakootas* was unquestionably a but-for cause of the alleged injuries.

The cities also cite *Calder* v. *Jones*, 465 U.S. 783 (1984), for support. *See* Br. 55 n.18. But in *Calder*, California was the "focal point" of defendants' allegedly tortious worldwide conduct. *Id.* at 789. That is simply not true here. The complaints contain no allegations that defendants' conduct outside California specifically targeted California residents in California. And even if the complaints allege facts purportedly demonstrating that climate-change-related harm was foreseeable everywhere, including California, they do not allege that defendants "expressly aimed" their conduct at California as a particular "focal point."

c. The District Court Properly Applied The But-For Test

The cities next argue that the district court misapplied the but-for causation test in two ways. Both arguments miss the mark.

i. The cities first argue that the district court erred by "requiring [them] to prove that the in-state *harms* they suffered were materially greater than the harms suffered by any other jurisdiction." Br. 56 (emphasis added). But the court did nothing of the sort. When the court stated that "whatever *sales or events* occurred in California were causally insignificant in the context of the world wide conduct leading to" climate change, E.R. 8 (emphasis added), it was saying only that the cities had failed to show that climate change and any attendant rise in sea levels would not have occurred but for defendants' California-related conduct. That was a correct application of the but-for test. *See Menken*, 503 F.3d at 1058; *Omeluk*, 52 F.3d at 272.

ii. The cities next argue that the district court erred by "requiring [them] to show that *each* [d]efendant's activities caused the *entirety* of the in-state harms." Br. 57; *see* Br. 49-50, 52-53. But the district court stated that the cities "need not show each defendant's contributions would have alone created the alleged nuisance." E.R. 8. In other words, the district court never required each defendant's conduct to be a *sufficient* cause of the cities' alleged injuries. But it did require each defendant's conduct to be at least a *necessary* cause. Again, that is a faithful application of the but-for test. *See Doe*, 112

F.3d at 1051-1052; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 265-266 (5th ed. 1984); *accord, e.g.*, *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47, 63 (2007); *United States* v. *Jackson*, 877 F.3d 231, 242 (6th Cir. 2017); *Krieger* v. *United States*, 842 F.3d 490, 503-504 (7th Cir. 2016).

The cities suggest that this Court's decision in *Western States*, *supra*, permits the exercise of specific jurisdiction here based on "defendants' *collective* conduct." Br. 53. That is incorrect. In *Western States*, the Court combined the jurisdictional contacts of a parent entity and a subsidiary that the parent "wholly owned and controlled" when assessing specific jurisdiction related to a price-fixing conspiracy. *See* 715 F.3d at 739 n.17, 740, 742-743. But here, the cities have not alleged a conspiracy, and no corporate connection exists between defendants.

The cities also argue that "[t]he proper inquiry" here is not conventional but-for causation, but instead "whether [d]efendants' purposefully directed conduct led to *increased* sea-level rise and *increased* harms to the local environment and public infrastructure." Br. 57. But the cities cite no authority for that novel proposition, and the district court rightly rejected it. The cities' contributing-cause theory of jurisdiction, as the district court recognized, "is not the causal test for personal jurisdiction applied in this circuit." E.R. 8. The Supreme Court also rejected a similar theory of causation in the criminal-law context in *Burrage* v. *United States*, 134 S. Ct. 881 (2014). The Court reasoned

that, "[t]aken literally," a contributing-cause test "would treat as a cause-in-fact every act or omission that makes a positive incremental contribution, however small, to a particular result." *Id.* at 891.

Again, what the cities are really seeking is a climate-change-specific exception to the normal rules of specific jurisdiction. They would subject any company that produces fossil fuels to suit in any forum in which the effects of global climate change are felt, on the ground that the combustion of fossil fuels contributes to global climate change. But that would render virtually every company, regardless of how incidental its connection to the forum, subject to specific jurisdiction for climate-change litigation everywhere—a result the Supreme Court has flatly rejected. *See Bristol-Myers*, 137 S. Ct. at 1781; *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 761-762 (2014).

The cities' contributing-cause argument presents still another problem. Even if the cities' approach were proper, the cities failed to allege that defendants' California-related conduct formed a "but for" cause of *any* sea-level rise. Nor did the cities allege that defendants' California-related conduct *collectively* formed a but-for cause of any rise. As the district court noted, therefore, "[i]t is manifest that global warming would have continued in the absence of all California-related activities of defendants." E.R. 7.

As a last-gasp argument, the cities suggest that this Court should adopt "the far-more-lenient 'substantial factor' [test]" set forth in the Second Restatement of Torts in place of the but-for test. Br. 52; *see* 1 Restatement (Second) of Torts § 435 (1965). California courts apply that test in nuisance cases, the cities reason, and the but-for standard "could never be satisfied where there are multiple tortfeasors." Br. 52, 57.

That argument fails for two reasons. *First*, this Court has made clear that "liability is not to be conflated with amenability to suit in a particular forum." *AT&T*, 94 F.3d at 591; *accord Central States Pension Fund* v. *Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000); *GCIU-Employer Retirement Fund* v. *Coleridge Fine Arts*, 700 Fed. Appx. 865, 869-870 (10th Cir. 2017). Even if California law applied and even if California would impose public-nuisance liability under a causal standard less stringent than but-for causation, that would not lower the *constitutional* floor for exercising personal jurisdiction. *See AT&T*, 94 F.3d at 591.

Second, the substantial-factor test is not "far more lenient" than the but-for test. Br. of Appellants 57. The substantial-factor test instead "subsumes" the but-for test and adds liability only in the narrow class of cases in which each defendant's action is alone sufficient, but not necessary, to bring about the same or a similar result (for example, when two fires burn down a home, but either fire by itself would have caused the same or similar damage). *See*

State ex rel. Wilson v. *Superior Court*, 174 Cal. Rptr. 3d 317, 335-336 (Ct. App. 2014); *see also Mitchell* v. *Gonzalez*, 819 P.2d 872, 878 (Cal. 1991). The cities do not allege that any single defendant's conduct was alone sufficient to cause climate change and any ensuing harms. The cities therefore failed to establish the necessary causal connection between their injuries and defendants' conduct under either the but-for test or the substantial-factor test.

In any event, this court should reject any effort to water down the but-for standard. Many other courts of appeals require *more* than a but-for connection between the plaintiff's claims and the defendant's conduct in order to establish specific jurisdiction. *See, e.g.*, *Beydoun* v. *Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014); *uBID, Inc.* v. *GoDaddy Group, Inc.*, 623 F.3d 421, 430 (7th Cir. 2010); *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007); *Nowak* v. *Tak How Investments, Ltd.*, 94 F.3d 708, 714-716 (1st Cir. 1996). There is no reason to take this Court's standard further in the opposite direction, and indeed, the Court may wish to take the opportunity to clarify that here, too, proximate cause is required. *See SPV OSUS Ltd.* v. *UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) (discussing possible circuit conflict).

B. Exercising Specific Jurisdiction Over Defendants Would Be Unreasonable

The cities' failure to satisfy the second, "arising out of" prong of this Court's specific-jurisdiction framework alone requires dismissal. *Western*

States, 715 F.3d at 742. For that reason, the district court did not reach the third prong of the jurisdictional analysis: whether the exercise of specific jurisdiction would be "reasonable," *see Axiom Foods*, 874 F.3d at 1068. E.R. 8. If this Court disagrees with the district court's analysis on the second prong, however, it can still address the third prong and affirm on that alternative basis. *See, e.g.*, *Direct Technologies, LLC* v. *Electronic Arts, Inc.*, 836 F.3d 1059, 1069 (9th Cir. 2016). As the record here demonstrates, the assertion of jurisdiction over defendants would not be reasonable under these circumstances. *See* D. Ct. Dkt. 278, at 23-25.

The "primary concern" in assessing the reasonableness of an assertion of personal jurisdiction is "the burden" the exercise of jurisdiction will impose "on the defendant." *Bristol-Myers*, 137 S. Ct. at 1780. While that "obviously requires a court to consider the practical problems resulting from litigating in the forum, . . . it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Id.* At bottom, "restrictions on personal jurisdiction" are "a consequence of territorial limitations on the power of the respective States," and a State's exercise of sovereign power "implie[s] a limitation on the sovereignty" of other States and even foreign nations. *Id.* In some cases, that sovereignty concern "may be decisive" in the jurisdictional analysis, even if the forum State has a strong interest in adjudicating the controversy. *Id.* at 1780-

1781; *see Freestream Aircraft (Bermuda) Ltd.* v. *Aero Law Group*, 905 F.3d 597, 607 (9th Cir. 2018) (assessing "the extent of conflict with the sovereignty of the defendant's state" as part of the reasonableness analysis).

Permitting courts to exercise specific jurisdiction over nonresident defendants for climate-change-related claims such as those asserted here would impose a massive burden on countless entities and would expand the sovereignty of local courts beyond all appropriate bounds. Again, the cities claim that defendants' worldwide production of fossil fuels contributed to climate change, which led to a rise in sea levels, which in turn caused harm in California. The cities thus are seeking to hale nonresident companies into California to account for what is, at its core, a global problem.

But the cities' only basis for personal jurisdiction is that this global problem, allegedly contributed to by defendants, caused harm in California. If that gives rise to personal jurisdiction for climate-change-related cases, then every jurisdiction in the United States could exercise jurisdiction over defendants and countless other companies and individuals for any climate-change-related costs. It would be an affront to those entities' home jurisdictions for their residents to face such a significant burden based on such an attenuated link between the residents' actions and the alleged forum injuries.

The problem is particularly pronounced with foreign defendants such as BP and Royal Dutch Shell. "Where, as here, the defendant is from a foreign

nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction." *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1126 (9th Cir. 2002) (citation omitted). The United States government has further noted that "foreign governments' objection to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Daimler*, 134 S. Ct. at 763 (citations omitted). Under the cities' theory of personal jurisdiction, however, any foreign entity could be haled into any court in the United States for its alleged contribution to global climate change. And if adopted abroad, the cities' theory of personal jurisdiction would also subject American companies and individuals to suit for climate-change-related injuries around the world. The cities' theory thus would impinge not only on the sovereignty of the fifty States, but on the sovereignty of the United States as well.

The cities have not shown why this is necessary. Plaintiffs are always free to file suit against defendants where defendants are subject to general personal jurisdiction. *See Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011). While that may mean plaintiffs seeking to pursue climate-change suits against foreign parent companies must file lawsuits abroad, *cf.* Br. of Appellants 59, it is not unreasonable to require those seeking to use the courts to address global problems to pursue global solutions.

To permit the exercise of specific jurisdiction under the cities' expansive theory would be unreasonable given the sovereignty interests at stake. The Court can affirm the district court's judgment on that basis as well.

C. BP And Royal Dutch Shell Are Not Subject To Specific Jurisdiction Under Federal Rule Of Civil Procedure 4(k)(2)

The cities finally contend that the district court erred in concluding that it lacked personal jurisdiction over BP and Royal Dutch Shell under Federal Rule of Civil Procedure 4(k)(2). The jurisdictional analysis under Rule 4(k)(2) is "nearly identical to traditional personal jurisdiction analysis," except that the court considers the defendant's "contacts with the nation as a whole" instead of with only the forum. *Holland America Line Inc.* v. *Wartsila North America, Inc.*, 485 F.3d 450, 462 (9th Cir. 2007).

The district court concluded that it lacked personal jurisdiction over BP and Royal Dutch Shell under Rule 4(k)(2) because, "[e]ven taking [the cities'] allegations as true, they have failed to show that BP or Royal Dutch Shell's national conduct was a 'but for' cause of their harm." E.R. 10. As to that holding, the cities argue only that the district court erred in relying on "the same erroneous causation analysis" as it did as to specific jurisdiction more generally. Br. 59. For all the reasons explained above, the district court faithfully applied this Court's framework for analyzing specific jurisdiction, and it committed no error in doing so.

* * * * *

The cities have not shown, and indeed cannot show, that their alleged climate-change-related injuries would not have occurred but for defendants' relevant jurisdictional contacts. And even if the cities had made such a showing, adoption of their expansive theory of specific jurisdiction would be unreasonable in this case and others. The district court therefore correctly dismissed the complaints for lack of personal jurisdiction.[3]

[3] To the extent that this Court disagrees, it should affirm for the reasons stated by Chevron Corporation in its brief addressing subject-matter jurisdiction and the merits. *See* Fed. R. App. P. 28(i).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF CONCURRENCE

Pursuant to Ninth Circuit Rule 25-5(e), I, Kannon K. Shanmugam, counsel for Exxon Mobil Corporation and a member of the Bar of this Court, certify that BP p.l.c., ConocoPhillips, and Royal Dutch Shell plc concur in the filing of this brief.

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam

STATEMENT OF RELATED CASES

BP, ConocoPhillips, ExxonMobil, and Royal Dutch Shell state that they are aware of the following related cases pending before this court: *County of San Mateo* v. *Chevron Corp.*, No. 18-15499; *City of Imperial Beach* v. *Chevron Corp.*, No. 18-15502; *County of Marin* v. *Chevron Corp.*, No. 18-15503; and *County of Santa Cruz* v. *Chevron Corp.*, No. 18-16376.

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FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on May 10, 2019, a copy of the attached Brief of Appellees BP p.l.c, ConocoPhillips, Exxon Mobil Corporation, and Royal Dutch Shell plc was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam